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Advance Directive News: The Reasonableness Standard

A recent case articulated the standard for determining whether a health care agent was acting pursuant to the principal's wishes. A controversy arose when a sister of a man identified as S.S. brought an action to appoint her the health care special needs guardian and guardian *ad litem* for her brother. The sister, identified as F. H., asked for the power to allow her to keep S.S. connected to a mechanical ventilator.¹ F. H. knew that her brother previously executed a health care proxy naming his wife, R.S., as health care agent but F.H. did not agree with the health care directions given by R. S.

Legislative History and Case Law

The Court looked to the legislative history of the health care proxy to determine the appropriate standard for deciding whether the health care agent was acting according to the wishes of S.S. In 1990 when the Public Health Law was amended to provide for the health care proxy² the legislative intent was to remove ambiguity from the health care decision making process. The legislation was enacted following the Court of Appeals decision *In Re O'Connor*³ because of concern that the very stringent clear and convincing evidence standard

¹ *S.S. v. R.S.*, 24 Misc. 3d 567, 877 N.Y.S.2d 860 (N.Y. Sup. Ct. 2009)..

² N.Y. Pub. Health Law § 29-C (Consol. 2009).

³ *In Re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (N.Y. 1988).

required by the O'Connor Court was too difficult to meet. To remedy this difficulty, the health care proxy law "was enacted to fill what was believed to be a 'critical gap' in the statutory framework governing health care decisions in New York."⁴ With passage of the health care proxy law, the legislature rejected the clear and convincing evidence standard and instead adopted a reasonableness standard.⁵

Almost 20 years have elapsed since the passage of the health care proxy law and there are relatively few published cases interpreting and applying Public Health Law 29-C. What this means is that the health care proxy law does what was intended; which is to remove uncertainty in regard to an individual's health care wishes. The Court in *S.S.*, however, noted that some courts were incorrectly applying the clear and convincing evidence standard in situations where a health care proxy existed⁶ and this incorrect application of the law continued the "legacy of confusion and legal uncertainty" that the health care proxy law was meant to avoid.⁷

Determining that the reasonableness standard was appropriate, the Court looked to determine *S.S.*'s reasonably known wishes by reviewing the written instructions included in his health care proxy and his oral declarations describing

⁴ *S.S.*, 877 N.Y.S.2d at 863.

⁵ *Id.* at 863 (citing Governor Cuomo's Memorandum of Approval of the health care proxy law, "If the patient's wishes **are not reasonably known**, the agent must decide based on a judgment about the patient's best interests." Highlighting another safeguard, the Governor noted that a health care agent can decide against the provision of artificial nutrition and/or hydration only when the decision reflects the **patient's reasonably known wishes.**)

⁶ *Id.* at 863 (citing *Matter of Univ. Hosp. of the State Univ. of New York Upstate Medical Univ.*, 194 Misc. 2d 372, 754 N.Y.S.2d 153 (Sup.Ct. Onondaga Co., 11/12/2002); *Matter of Balich*, 2003 NY Slip Op. 51080(U) [Sup. Ct. Suffolk Co., 7/10/03]; *Borenstein v. S. I. son*, 8 Misc. 3d 481 797 N.Y.S.2d 818 [Sup. Ct. Queens Co., 3/30/2005].)

⁷ *Id.* at 862.

his health care wishes. On first blush the written directive appeared to contradict the verbal statements. Once the Court determined what S.S.'s reasonably known health care wishes were it then examined whether the agent was acting in good faith in implementing those reasonably known wishes.⁸

The Facts

S.S. was a man who enjoyed his life. He suffered from obesity which eventually limited his ability to breathe. In November 2006 S.S. was brought to the emergency room with elevated carbon dioxide levels. S. S. was hospitalized and required a tracheotomy and was placed on a mechanical ventilator. S.S. was eventually weaned off the ventilator and he returned home. In a subsequent visit to his physician, Dr. A., counseled S.S. about his ongoing treatment alternatives. A discussion ensued and S.S. stated that "he did not want a mechanical ventilator or artificial nutrition."⁹ According to R.S. her husband often complained about his trache and repeatedly tried to have it removed, stating, "This is no way to live."¹⁰

Testimony during the trial shed further light on S.S.'s wishes.

S.S. spoke about the people he saw while he was in ICU and "rehab", dependent on tubes to live and was very animated and emphatic that he was willing to die rather than live like that. This was so, despite having already benefitted from the type of devices he was now rejecting, i.e., the NG (nasogastric feeding) tube and respirator during the November 2006 hospitalization.¹¹

In response to S.S.'s clearly articulated wishes, Dr. A. provided S.S. with a statutory health care proxy form and suggested that he fill it out. R.S. at her

⁸ *Id.* at 863.

⁹ *Id.* at 864.

¹⁰ *Id.* at 864.

¹¹ *Id.* at 864.

husband's direction actually filled out the form for S.S.'s signature. The health care proxy was signed in January 2009. The statutory form provides a space to write in optional instructions. When preparing health care proxies for clients attorneys tend to be very careful to provide unambiguous instructions about health care wishes. S.S. did not have the benefit of counsel and the language used in the proxy became problematic. Although S.S. clearly stated to his doctor and to his wife that he did not want to be dependant upon a respirator or artificial nutrition, in the portion of the form allowing for optional instructions, S.S. directed his wife to write "I wish to live."¹²

Shortly after executing the health care proxy S.S. was again admitted to the hospital and he was connected to a mechanical ventilator. It was at this point that F.H., sister of S.S, petitioned the Court. F.H. alleged that her sister-in-law, R.S., was not following the wishes of S.S. because he "wish[ed] to live" and furthermore the health care agent was motivated to remove the ventilator because she faced financial ruin if forced to continue paying for S.S.'s health care.¹³ F.H. further alleged that R.S. was not acting in the best interest of S.S. because as health care agent "she had not agreed to the insertion of a PEG tube."¹⁴

F.H. is an Orthodox Jew whose religious belief was to prolong life no matter what the circumstance. S.S. was raised as an Orthodox Jew but had not been

¹² *Id.* at 865 (This statement was followed with three exclamation points. R.S. testified that the exclamation points were not added at S.S.'s direction but rather was added of her own volition as it was her habit to add the emphasis of exclamation points.).

¹³ *Id.* at 865.

¹⁴ *Id.* at 865.

observant for decades.¹⁵ The statement “I wish to live” was in sharp contrast to the extensive conversation S.S. had with his physician advising Dr. A. that he wanted to live his way and on his terms, independent of machines. The written words juxtaposed with the verbal directions left the Court to “reconcile those seemingly incongruent and impossible desires to determine the principal’s wishes and whether the agent ... [was] acting in accordance with those health care wishes.”¹⁶

The Court examined S.S.’s religious beliefs to be certain the decision arrived at would not substitute the sister’s beliefs for those of S.S. S.S. chose his health care agent carefully. Although evidence showed he was close to his sister, he did not name her as substitute agent nor did he discuss his health care wishes with her. S.S. chose his wife as his agent because he felt she knew what he wanted and it was unlikely that she would substitute her wishes for his.

The Decision

The Court relied on the reasonableness standard to determine S.S.’s wishes. It reviewed the written instructions of the health care proxy and the substantial conversations of S.S. concerning his health care wishes. The Court reviewed the evidence submitted and found that the verbal directions given to Dr. A. and R.S. demonstrated that although S.S., “indicated his desire to live life to the fullesthe did not want to be on a respirator... he did not even want the trache, a less burdensome form of treatment.”¹⁷ The Court looked at the totality of the evidence and did not solely rely on the static written words inserted into the

¹⁵ *Id.* at 864.

¹⁶ *Id.* at 863.

¹⁷ *Id.* at 864.

statutory health care proxy form. It looked at the written words in the context of S.S.'s life and lifestyle and gave great weight to his oral declarations. After analyzing the evidence presented the Court determined that S.S.'s reasonably known wishes were not to be hooked up to a mechanical ventilator or receive artificial nutrition.

Accordingly the Court found S.S.'s health care proxy a valid document and that R.H. was acting consistent with her husband's reasonably known wishes. As there was no proof offered by F.H. to override the health care decisions of R.S. or that the decisions were made in bad faith or that the decisions were not made in accordance with the health care proxy law the Court decided that there was no need for a guardian of the person or property and dismissed the Petition.¹⁸

Conclusion

Had the Court reviewed the evidence using the clear and convincing standard set by the O'Connor Court it is unlikely it could have arrived at the decision it did. S.S. included the statement "I wish to live" in his document and the evidence produced at trial did indicate that he was an exuberant lover of life. The statement was in sharp contrast to other evidence introduced at trial, his verbal declarations about what kind of life was acceptable to him. The statement "I wish to live" created an ambiguity which most likely would have been fatal if the clear and convincing evidence standard were employed to determine S.S.'s wishes in regard to end of life decision making.

¹⁸ *Id.* at 866.

The use of the reasonableness standard to determine S.S.'s health care wishes allowed the health care proxy to do what was intended when the legislation was first envisioned. It permitted the selected health care agent, to make health care decisions based upon her broad knowledge of her husband's wishes in the context of his medical situation and prognosis.

The health care proxy is a powerful tool to assure that an individual's health care wishes are respected. The health care agent must reasonably know the principal's wishes. The S.S. case demonstrates that where some ambiguity exists it is the totality of the evidence that eventually will demonstrate a person's reasonably known wishes. The S.S. decision reinforces the importance of directing clients to fully and explicitly discuss with others their health care wishes. This is often a distasteful and difficult task for clients but as Elder Law Attorneys we need to encourage the dialogue.